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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JAMES KEIFER et al., Plaintiffs and Respondents, v. WELDON HORTON et al., Defendants and Appellants.	B172909 (Los Angeles County Super. Ct. No. BC251701)

APPEAL from an order of the Superior Court of Los Angeles County. Robert H. O'Brien, Judge. Affirmed.

Blatz, Pyfrom & Associates, Gregory C. Pyfrom and Michael J. Allison for Defendants and Appellants.

Daniels, Fine, Israel & Schonbuch, Moses Lebovits and Jennifer Schrack for Plaintiffs and Respondents.

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Defendants and appellants Weldon Horton and Amerispec Home Inspection Service were awarded partial costs as the prevailing parties in a negligence action. Appellants challenge that portion of the court's order denying their claims for expert witness fees of $185,209.85 and attorney fees of $428,723.27. We affirm the trial court's order. However, we deny respondents' request for sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

In 2000, respondents James and Kathleen Keifer hired appellants to inspect a house they were in the process of purchasing. Pursuant to a written contract, the Keifers paid $585 for the inspection and received a written report. After moving into the house, the Keifers discovered that it was uninhabitable due to the presence of toxic mold.

On behalf of themselves and their three children, the Keifers sued multiple parties, including appellants, on numerous causes of action. As to appellants, the complaint alleged a cause of action for negligence, asserting that appellants "had a duty to conduct the home inspection with the degree of care that a reasonably prudent home inspector would exercise."[1] The complaint alleged that appellants negligently inspected the property by failing to discover or report construction defects that had resulted in water intrusion and the presence of mold. The complaint further alleged that as a result of appellants' negligence, the Keifers had suffered personal injuries, property damage, pain and suffering and severe emotional distress.

Appellants filed an answer, asserting 23 affirmative defenses. Along with their answer, appellants served on each of the five plaintiffs an offer to compromise the action for the sum of $1,001 with a waiver of costs, pursuant to Code of Civil Procedure section 998.

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[1] The complaint also alleged a cause of action against appellants for conspiracy, which was dismissed by respondents prior to trial.

Respondents did not accept appellants' offers, but settled with the other defendants for approximately $725,000 following mediation. In August 2003, the case proceeded to trial against appellants. The jury returned a verdict in favor of appellants finding that they were not negligent. Thereafter, as the prevailing parties, appellants filed a memorandum of costs in the amount of $211,362.71, including expert witness fess of $185,209.85, and filed a motion seeking $428,723.27 in attorney fees. Respondents filed a motion to tax costs and opposed the motion for attorney fees. Respondents denied having received any pretrial statutory offers of compromise from appellants.

The trial court awarded appellants partial costs. While the court found that the offers to compromise had been sent by appellants and received by respondents, the court denied recovery of expert witness fees. The court found that appellants' pretrial statutory offers to compromise in the total amount of $5,005 "were not in good faith, were merely token and nominal demands" and "were made without any reasonable prospect of acceptance" and were thus "ineffectual." The court stated that at the time the offers were made, the defendants had little, if any, discovery and had insufficient data as to the extent of damage in the house. The court noted that appellants' entire analysis of appellant Weldon Horton's possible exposure was based on Horton's own opinion, and that appellants ignored the possibility of liability based on common-law negligence. The court also denied recovery of attorney fees, finding that no claim was based on a contract and that there was no applicable attorney fees provision. This appeal followed.

DISCUSSION

Expert Witness Fees

Appellants contend the trial court abused its discretion in denying their claim for expert witness fees on the ground that their pretrial offers to compromise were not reasonable and made in bad faith. We disagree.

Code of Civil Procedure section 998 provides that "(b) Not less than 10 days prior to commencement of trial . . . any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance

with the terms and conditions stated at that time. . . . [¶] . . . [¶] (c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover the costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

As an initial matter, respondents reassert their claim that they never received any pretrial statutory offers to compromise from appellants. In this regard, the parties submitted to the trial court conflicting declarations of their counsel. Appellants' counsel stated that the offers to compromise were served by mail with the answer, and submitted copies of the five offers that were served, including the proofs of service. Respondents' counsel stated that no such offers were ever received by his office and that appellants' counsel never mentioned the offers at any time. The trial court specifically found that the offers were prepared and sent by appellants and that they were received by respondents' counsel. We accept the trial court's resolution of this factual dispute. (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 123 [where the evidence is in conflict, this court will not disturb the trial court's findings].) In any event, appellants have not demonstrated that the trial court abused its discretion in finding that the offers to compromise were not valid.

In order for an offer made pursuant to Code of Civil Procedure section 998 to be valid, courts have generally read into the statute a requirement that the offer was made in good faith. (*Elrod v. Oregon Cummins Diesel, Inc*. (1987) 195 Cal.App.3d 692, 698.) A contrary conclusion would frustrate the statute's purpose of encouraging pretrial settlements because a party would have no incentive to accept an unreasonable offer. (*Id*. at pp. 698-699.) Whether an offer was reasonable and made in good faith is a matter left to the sound discretion of the trial court. (*Id*. at p. 700.) Where the offeror obtains a

judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeree has the burden to prove otherwise. (*Ibid*.) On appeal, the losing party has the burden of establishing the trial court abused its discretion. (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 339.) We will not substitute our opinion for that of the trial court unless the trial court clearly abused its discretion, resulting in a miscarriage of justice. (*Ibid*.)

Whether a statutory offer to compromise is reasonable must be determined by looking at the circumstances when the offer was made. (*Elrod v. Oregon Cummins Diesel, Inc., supra*, 195 Cal.App.3d at p. 699.) As a general rule, the reasonableness of a defendant's offer is measured by a two-part test: (1) whether the offer represents a reasonable prediction of the amount of money, if any, the defendant would have to pay the plaintiff following a trial, (2) and whether the defendant's information in making the offer was known or reasonably should have been known to the offeree. (*Ibid*.) "[T]he section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer." (*Ibid.*)

Appellants claim that their offers totaling $5,005, with a waiver of costs,[2] were not nominal or token, as the trial court found. But the evidence shows that the amount of the offers was determined based on the amount of appellants' $5,000 self-insured retention under their insurance policy, rather than on any potential exposure for negligence. While even a modest or "token" offer may be reasonable if an action is completely lacking in merit (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136), this was not necessarily the case here. Appellants claim that their liability was minimal given their "limited duty" established by the parties' written contract. But appellants' argument ignores the fact that

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[2] According to appellants, the unchallenged costs amount to $21,969.51.

they were being sued for negligence and not for breach of contract.[3] Appellants assert that "if anyone was going to be found negligent in regards to failure to disclose wood rot and infestation, it would have been the termite inspector." But appellants provide no support for this assertion. Appellants also assert that "respondents would have never accepted the subject offers" because they still contend that appellants were negligent.

To be valid, an offer must have some reasonable prospect of acceptance. (*Elrod v. Oregon Cummins Diesel, Inc.*, *supra*, 195 Cal.App.3d at p. 698.) In reversing an award of expert witness fees in a personal injury action in the context of a settlement offer of $1 where no damage amount was alleged but where damages were determined to exceed $18,000, the court in *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821 stated: "A plaintiff may not reasonably be expected to accept a token or nominal offer from any defendant exposed to this magnitude of liability unless it is absolutely clear that no reasonable possibility exists that the defendant will be held liable. If that truly is the situation, then a plaintiff is likely to dismiss his action without any inducement whatsoever. But if there is some reasonable possibility, however slight, that a particular defendant will be held liable, there is practically no chance that a plaintiff will accept a token or nominal offer of settlement from that defendant in view of the current cost of preparing a case for trial."

The offers here were made at the inception of the lawsuit and before respondents had conducted any discovery or consulted any experts. Respondents claim they were not in a position to meaningfully evaluate the offers at such an early stage of the litigation. At the time the offers were made, it was still respondents' position that appellants had negligently conducted the home inspection by failing to discover and report water intrusion and the presence of mold, and appellants had not provided respondents with any

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[3] See *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1436 ("a home inspector may be liable in tort for breach of his common law or statutory duty to exercise due care in preparing a home inspection report").

information suggesting that appellants had no liability. Appellants' counsel never discussed with respondents' counsel the perceived lack of merit in respondents' negligence and conspiracy claims prior to expiration of the offers, nor had appellants brought the weaknesses of the case to respondents' attention by some other means, such as a demurrer or a motion for judgment on the pleadings or for summary judgment. The affirmative defenses asserted in the answer were largely pro forma.

Appellants claim that respondents must have had sufficient information to evaluate the offers because they would otherwise have filed the complaint in bad faith and in violation of Code of Civil Procedure section 128.7, subdivision (b), which requires the complaint's allegations to have evidentiary support. Furthermore, the respondent minors had requested an early trial date pursuant to Code of Civil Procedure section 36, subdivision (b). But appellants' arguments ignore the fact that lawsuits evolve over time, and a party should be given a chance to develop the facts and applicable law before being asked to make a decision that, if made incorrectly, could add significantly to its costs of trial. (*Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 390.)

We conclude that appellants have not met their burden of showing a clear abuse of the trial court's discretion resulting in a miscarriage of justice. Accordingly, we affirm that portion of the order denying appellants recovery of expert witness fees.

Attorney Fees

Appellants also contend the trial court erred in denying their claim for attorney fees on the ground that there was no contract action or applicable attorney fees provision. Once again, we disagree.

The home inspection agreement executed by appellant Amerispec Home Inspection Service and respondent James Keifer contained the following provision under the heading marked "Fee": "You agree to pay the fee stated on Page 2 of this agreement for the performance of the inspection service(s). <u>This amount shall be paid in full prior to the completion of the inspection</u> (unless otherwise agreed in writing by the parties). Should you fail to timely pay the agreed upon fee(s), you shall be responsible for paying

any and all fees associated with collection, including but not limited to administration costs, attorney's fees, and cost of litigation."

Appellants brought their claim for attorney fees under Civil Code section 1717. Subdivision (a) provides in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." "By its terms, therefore, Civil Code section 1717 has a limited application. It covers *only* contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce *that* contract." (*Xuereb v. Marcus & Millichap, Inc*. (1992) 3 Cal.App.4th 1338, 1342.)

The trial court found that appellants were not entitled to recover their attorney fees under Civil Code section 1717 because the action against them was based on general negligence and not on a contract. Appellants argue that the title of the cause of action is not determinative, relying on *Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051. But appellants' reliance is misplaced. In *Bruckman*, the appellate court found that an award of attorney fees under Civil Code section 1717 was proper even though the cause of action alleged was negligence. In so finding, the court noted that the plaintiff's trial brief alleged that his losses were incurred by the defendant's negligence and breach of contract and that plaintiff's counsel's opening statement at trial also alleged both negligence and breach of contract. (*Bruckman, supra,* at p. 1059.) The court noted that the theory of liability was well-known to the court and counsel during trial. (*Id*. at p. 1060.)

There is no similar evidence here. Appellants simply assert that "respondents' counsel repeatedly referred to the contract as evidence of the duties that were to be performed by the appellant and of his alleged breach of duties of standard of care listed therein." But the trial court, which had presided over the parties' trial, disagreed that

respondents had proceeded on a contract claim. "'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Appellants assert that the negligence cause of action was based upon a duty that could only have arisen from the contract by which respondents hired appellants. But the mere existence of a contract does not automatically convert respondents' negligence claim into a contract claim. In reversing an attorney fees award in a legal malpractice action, the court in *Loube v. Loube* (1998) 64 Cal.App.4th 421, 430 noted that "although the parties had a contractual relationship, and appellant's claim for legal negligence arose from the relationship between them, which relationship was founded on a contract, the cause of action sounded in tort and was no more 'on the contract' than a claim for breach of fiduciary duty or for fraud involving a contract. It follows that Civil Code section 1717 provides no basis for an award of attorney fees." Appellants have not demonstrated the trial court erred in finding that the action was not based on a contract.

But even if the action had been based on a contract, we agree with the trial court that there is no applicable contract provision that would allow appellants to recover their attorney fees here. The attorney fees provision at issue provides that "[s]hould you fail to timely pay the agreed upon fee(s), you shall be responsible for paying any and all fees associated with collection, including but not limited to administration costs, attorney's fees, and cost of litigation." The contract language is clear that attorney fees are limited to collection actions. The lawsuit here was not a collection action.

Appellants assert that limiting the attorney fees provision to collection actions would render it meaningless "[s]ince the home inspection fee was paid concurrently with the signing of the contract, and before the inspection report was issued, [so that] there could not have been any anticipation of litigation concerning the payment of the fee." But the contract provides that the fee "<u>shall be paid in full prior to the completion of the inspection</u> (unless otherwise agreed in writing by the parties)." Thus, the contract allows

the fee to be paid at a later date and contemplates that collection may become an issue giving rise to litigation. There is simply no merit to appellants' position that the only purpose of the provision was "to cover any litigation arising from the subject of the agreement." The provision here simply did not provide such broad coverage.[4] The fee provision was narrowly drafted to apply only to collection actions. As the court noted in *Kalai v. Gray* (2003) 109 Cal.App.4th 768, 778: "The fee agreement in this case is not in need of interpretation. It is not rendered ineffective by any other provision of the agreement. It is simply limited." We are satisfied that the trial court properly determined that appellants were not entitled to recover their attorney fees.

Request for Sanctions

Respondents request that we impose sanctions on appellants pursuant to Code of Civil Procedure section 907[5] and California Rules of Court, rule 27(e)[6] for filing a

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[4] Contrast the fee provisions in *Santisas v. Goodin* (1998) 17 Cal.4th 599, 603: "'In the event legal action is instituted by the Broker(s), or any party to this agreement, or arising out of the execution of this agreement or the sale, or to collect commissions, the prevailing party shall be entitled to receive from the other party a reasonable attorney fee . . .'"; *Xuereb v. Marcus & Millichap, Inc., supra,* 3 Cal.App.4th 1338, 1340: "'If this Agreement gives rise to a lawsuit or other legal proceeding between any of the parties hereto, . . . the prevailing party shall be entitled to recover actual court costs and reasonable attorneys' fees in addition to any other relief to which such party may be entitled'"; *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 159: fees to be awarded to the prevailing party in "any action or proceeding arising out of this agreement."

[5] Code of Civil Procedure section 907 provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."

[6] California Rules of Court, rule 27(e)(1) provides: "On a party's or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs, on a party or an attorney for: [¶] (A) taking a frivolous appeal or appealing solely to cause delay."

frivolous appeal. Although we have concluded that the arguments raised by appellants are without merit, we do not find the appeal to be so frivolous as to warrant sanctions. "An appeal should be held frivolous only when it is prosecuted for any improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. However, an appeal that is simply without merit is not by definition frivolous." (*Wilburn v. Oakland Hospital* (1989) 213 Cal.App.3d 1107, 1111.)

DISPOSITION

The order is affirmed. Respondents to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST